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DIVISION II

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No. 34334-7-II

STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

JOHNATHON D ROSWELL

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Assignments of Error

1. The evidence was insufficient to convict Mr. Roswell of two counts of Communication with a Minor for Immoral Purposes.
2. The State presented insufficient evidence that Mr. Roswell was convicted of a felony sex offense prior to May 15, 2005.
3. The trial court erred by denying Mr. Roswell's partial jury waiver.
4. The trial court erred by imposing an exceptional term of community custody.

Issues Pertaining to Assignments of Error

1. Among the allegations testified to in Mr. Roswell's prosecution for two counts of Communication with a Minor for Immoral Purposes was that he asked two teenage girls if they would have sex with him when they turned eighteen. May he be convicted for inviting such a lawful act?
2. The "to convict" instruction required the State to prove that Mr. Roswell was convicted of a felony sex offense prior to May 15, 2005. Is the evidence sufficient for a conviction when there was no evidence of the date of his prior felony sex offense?

3. Mr. Roswell stipulated to the existence of a prior felony sex offense and waived his right to have a jury decide that issue. The trial court refused the waiver. Did the trial court err by denying Mr. Roswell's partial jury waiver?

4. Did the trial court err by imposing an exceptional term of community custody without stating the basis for the ruling?

B. Statement of the Case

1. Procedural History

Jonathon D. Roswell went to trial on an amended information. CP, 12. He was charged with five felony sex offenses involving three minors. He was convicted of three of those counts. CP, 106. He was convicted of count one charging Child Molestation in the Second Degree involving DMW, acquitted of count two, Child Molestation in the Third Degree involving CMP, convicted of two counts of felony Communication with a Minor for Immoral Purposes involving DMW and CMP, and acquitted of a final count of Communication with a Minor for Immoral Purposes involving LB.

Mr. Roswell has previously been convicted of a felony sex offense. CP, 123. The offense of Communication with a Minor for Immoral Purposes is a felony if the defendant has a prior felony sex offense. RCW

9.68A.090(2). The parties disagreed how this issue should be addressed. The proposal from the defense was that Mr. Roswell stipulate to the existence of the prior felony sex offense, and that he waive his right to a jury on that issue. RP (Dec. 5, 2005), 19. In support of that proposal, Mr. Roswell submitted a Stipulation of Defendant to Allegation of Prior Conviction of Sex Crimes and Partial Waiver of Jury Trial. CP, 21. The stipulation reads, "That [Mr. Roswell] is the named Defendant in cause number 03-1-01047-1 in Kitsap County Superior Court which resulted in him being convicted of Child Molestation in the Third degree, a Class C Felony under the laws of the state of Washington." CP, 21. The reason for this proposal was stated bluntly by defense counsel, "I don't want the jury to hear that Mr. Roswell has a prior sex offense." RP (Dec. 5, 2005), 20. The State took the position that the defense cannot stipulate to an element of the crime and thereby "eviscerate" the State's case. RP (Dec. 5, 2005), 26. Mr. Roswell questioned whether the existence of a prior offense is an element or an aggravating factor, but regardless, argued that the defendant may waive his right to have a jury decide an issue if the issue does not go to the res gestae of the offense. RP (Dec. 5, 2005), 29-30. The court overruled the defense objection, but ruled the State would only be allowed to show that it was a prior sex offense and would not be allowed to show that it was a prior child molestation charge. RP (Dec. 5, 2005), 30. Mr.

Roswell asked for a “continuing objection to that evidence.” RP (Dec. 5, 2005), 31. The court noted the continuing objection.

It appears that the stipulation to the prior sex offense was not read to the jury. At the time of jury instructions, the court instructed the jury, “The defendant has previously been convicted of a felony sexual offense.” CP, 122. The “to convict” instructions for the offense of Communication with a Minor for Immoral Purposes each required the jury to decide whether the State had proved beyond a reasonable doubt that “prior to the 15th day of May, 2005, the defendant was convicted of a felony sex offense.” CP, 126-27. This instruction was proposed by the State. CP, 103-04.

The State brought a motion in limine to introduce the facts underlying the prior felony sex offense, a conviction for child molestation. RP (Dec. 5, 2005), 31-33. The court weighed the facts of the prior conviction under ER 403 and 404(b) and concluded that the underlying facts were not admissible. CP, 23.

Each of the convictions charged two aggravating circumstances: rapid recidivism and multiple current offenses. CP, 12. The jury was unable to reach a unanimous decision on whether Mr. Roswell committed the current offense shortly after being released from incarceration. CP, 108.

Mr. Roswell brought a pre-trial motion to dismiss the aggravating factor of multiple current offenses. CP, 26. The court denied the motion. RP, 6. The court found RCW 9.94A.535(2)(c) constitutional, even in light of State v. Hughes, infra. RP, 7.

At sentencing the State requested an exceptional sentence of 240 months, RP (Jan. 20, 2006), 5. The proposed exceptional sentence was based upon the fact that the defendant committed "multiple current offenses" which resulted in an offender score of greater than "9." RP (Jan.20, 2006), 4. According to the prosecutor, failure to give an exceptional sentence would "result in the current offenses basically going unpunished, or the free crime doctrine." RP (Jan.20, 2006), 4. The defense objected to the proposed exceptional sentence. RP (Jan.20, 2006), 8.

The court determined Mr. Roswell's offender score is "13." CP, 135. This is based upon two prior sex offenses, two current sex offenses, and being on community placement at the time of the offense. CP, 135. His standard sentencing range was 87 to 116 months and his standard community custody range was 36 to 48 months. CP, 136. Turning to the issue of whether to impose an exceptional sentence, the court said, "[I]t's hard to decide whether the aggravating factor is sufficient in your case to warrant the exceptional sentence. I'm toying – not toying with. That's the

wrong word. I'm struggling with that. I'm not going to do it. Perhaps I should, but I'm not." RP (Jan.20, 2006), 15. The judge imposed a sentence at the top of the standard range sentence.

But then, as if in an afterthought, the judge says, "I am, however, going to impose the 60 months community custody, exceptional probationary period, because I believe you should be – if I could, I would give you probation for life. It is concerning for the reasons I've set forth, that you don't appear to acknowledge the seriousness of the charges against you and the harm that you caused the victims. And I hope you are amenable to treatment. But if you're not, I want somebody to supervise you for as long as the law will allow." RP (Jan.20, 2006), 16. The court imposed a sentence of 116 months with 60 months of community custody as an exceptional sentence. CP, 136. No written findings of fact and conclusions of law were entered in support of the exceptional sentence.

2. Substantive Facts

DMW was born July 23, 1991. RP, 16. At the time of her trial testimony, she was fourteen years old. RP, 15. She met Mr. Roswell through a friend of her sister. RP, 17. She had known him since she was five or six years old. RP, 17.

DMW and her friends liked to hang out at a particular public park. RP, 21. She hung out at least three times per week. RP, 21. On a

particular day in May or June of 2005, DMW saw Mr. Roswell. RP, 18-19. She had not seen him for a while and so she ran over and gave him a hug. RP, 20. This was a "regular hug," such as friends would exchange. RP, 24. CMP was also present that day. RP, 21.

After becoming reacquainted with Mr. Roswell, DMW continued to see him "at least two times a week." RP, 22. They also spoke by cell phone. RP, 23. DMW did not give out her cell phone number right away, but waited for a while. RP, 23. The record does not say how long she waited. They started calling each other once a day. RP, 23. During this period, DMW began to view Mr. Roswell "in a boyfriend-girlfriend kind of way." RP, 23.

At trial, DMW was asked, "[A]t some point in your relationship, did things start to get uncomfortable for you?" DMW answered in the affirmative. RP, 24. The type of hugging they would exchange started to change. RP, 24. Mr. Roswell touched her on her stomach, breasts, and butt. RP, 24. The touching was on top of her clothes. RP, 25. DMW was unable to remember how many times this occurred, but it was more than once. RP, 26. It made her feel uncomfortable and she told him so. RP, 26. She thinks the first time he touched her was in late May or early June. RP, 28.

On occasion, CMP was present to observe the touching. RP, 27. CMP testified she observed Mr. Roswell and DMW alone in the woods at the park. RP, 79.

Mr. Roswell also brought up the subject of sex with her. RP, 28. Mr. Roswell wrote down in a little black book that when she turned eighteen, they were going to have sex. RP, 29. He read aloud what he had written and DMW said, "No." RP, 29. But she signed the black book. RP, 29. DMW did not think he was serious. RP, 29. On direct examination, DMW testified that Mr. Roswell never asked her to have sex with him in the park. RP, 30. This was different than what she told the police prior to trial. RP, 32.

On one occasion, Mr. Roswell asked CMP if she had ever had sex. RP, 75. He would ask her and DMW to have sex with him. RP, 77. The conversation was "just casual" about this topic. RP, 76. The only direct quotation offered by CMP was, "Have you ever had sex?" RP, 75. On one occasion, Mr. Roswell had the little black book and asked CMP to sign it, which she did. RP, 78.

LB was aware of the little black book. RP, 60. She knew that DMW and CMP had both signed it. RP, 61. Mr. Roswell asked her to sign it as well, but she refused. RP, 60. She remembers reading, "I, Courtney,

promise to have sex with you when I turn 18, but this is void if I have a boyfriend at the time.” RP, 60.

C. Argument

1. The evidence was insufficient to convict Mr. Roswell of two counts of Communication with a Minor for Immoral Purposes.

Mr. Roswell was convicted of two counts of Communicating with a Minor for Immoral Purposes, one for DMW and one for CMP. The State argued in the alternative that he could be convicted of either inviting them to have sex with him or for having them sign the little black book. RP, 99. The State conceded that the testimony of requesting sex was not “elaborate[d]” on. RP, 99. According to the State, the evidence of the contents of the little black book was corroborated by the testimony of LB, who read the black book and testified about the exact quotation. RP, 99.

Regarding the alleged invitations to have sex, DMW never offered a direct quotation. In fact, she testified that Mr. Roswell never asked her to have sex with him. On cross-examination, she admitted that she told the investigators that he had asked her to have sex with him. Given this ambiguous testimony, there is no way to conclude beyond a reasonable doubt that the jury would have convicted Mr. Roswell for allegedly inviting DMW to have sex with him.

Similarly, the evidence of Communicating with CMP is also ambiguous. The only direct quotation offered by CMP was, "Have you ever had sex?" RP, 75. But she also testified that this was "just casual" conversation, which would lead to the inference that it was not a genuine offer. Again, there is no way to conclude beyond a reasonable doubt that the jury would have convicted Mr. Roswell for allegedly inviting CMP to have sex with him.

Conversely, the testimony regarding the little black book was testified to with great specificity. All three girls testified that Mr. Roswell asked them to sign the book. Two of them did sign. Although CMP was somewhat vague on the content of the book, DMW and LB described it well. LB offered the most detailed quotation from the book, "I, Courtney, promise to have sex with you when I turn 18, but this is void if I have a boyfriend at the time." RP, 60.

At the request of the State, the court instructed the jury using the standard Petrich instruction. CP, 112. The State did not elect between which alleged comments constituted the crime of Communicating, relying instead on the requirement that the jury be unanimous as to which act had been proved.

The State relied upon two alternative means to convict Mr. Roswell. In an alternative means case, where a single offense may be

committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternate means. But if one of the alternate means upon which a charge is based fails and there is only a general verdict, the verdict cannot stand unless the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced. State v. Nicholson, 119 Wn.App. 855, 84 P.3d 877 (2003), quoting State v. Bland, 71 Wn.App. 345, 860 P.2d 1046 (1993).

Mr. Roswell concedes that, while weak, the evidence that he invited either DMW or CMP or both to have sex with him is supported by substantial evidence. This was a credibility determination for the jury to resolve. But there is not substantial evidence of the alternative means that he invited sex with them using the little black book.

A person may not be convicted of Communication with a Minor for Immoral Purposes based upon a communication about a lawful act. A person “communicates with a minor under RCW 9.68A.090 if he or she invites or induces the minor to engage in prohibited conduct.” State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006), citing State v. McNallie, 120 Wn.2d 925, 846 P.2d 1358 (1993). A person may not be convicted of

Communication with a Minor for talking about acts that would be legal if engaged in. State v. Danforth, 56 Wash. App. 133, 782 P.2d 1091 (1989) (inviting sixteen and seventeen year old girls to have sex did not constitute Communicating); State v. Wissing, 66 Wn.App. 745, 833 P.2d 424 (1992) (same); State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992) (same). Compare State v. Pietrazak, 100 Wn.App. 291, 997 P.2d 947 (2000) (asking sixteen year old to perform sexual acts while being photographed falls within the core of the statute because person being photographed engaged in sexually explicit conduct must be eighteen); State v. McNallie, supra (same).

In Mr. Roswell's case, the evidence relating to the black book was that he asked three girls to have sex with him when they turned eighteen. Had he asked them to engage in sex immediately, it would have been unlawful. But the communication was about sex that would be legal when they turned eighteen. The communication was not, therefore, about prohibited conduct, but permitted conduct. There is not substantial evidence of this alternative means, and the court should not have permitted this alternative means to be considered by the jury. The remedy is a new trial solely on the issue of whether Mr. Roswell asked one or both of them to engage in sexual intercourse immediately.

2. The State presented insufficient evidence that Mr. Roswell was convicted of a felony sex offense prior to May 15, 2005.

Under the law of the case doctrine, statements made in the “to convict” jury instruction that are included without objection must be proved beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). In Hickman, the jury was instructed that the crime must have occurred in Snohomish County, though venue is not actually an element of the offense. When the State failed to prove venue, the remedy was dismissal for insufficient evidence.

In Mr. Roswell’s case, the State submitted a “to convict” jury instruction that was eventually read by the court which required it to prove that the prior felony sex offense became final prior to May 15, 2005. Mr. Roswell stipulated that he had a prior child molestation conviction in cause number 03-1-01047-1 in Kitsap County Superior Court. But there is no evidence whether that conviction occurred before or after May 15, 2005. The State failed to prove this element.

The case of State v. Wolf, 134 Wn.App. 196 (2006) is distinguishable. In that case, the defendant stipulated that he had a prior serious offense, an element of unlawful possession of a firearm. He also agreed that the fact of the stipulation would be included in a jury instruction. The stipulation was never read to the jury. On appeal, the

defendant claimed the evidence was insufficient to prove he had a prior serious offense. The Court of Appeals affirmed because the defendant had waived his objection. The Court said, “The premise of the waiver theory is that, upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element.” Wolf at 199.

In Mr. Roswell’s case, it appears the stipulation was not read to the jury. The failure of Mr. Roswell to request that it be read is waived under the analysis of Wolf. But the issue does not end there. First, the “to convict” instruction required the State to prove a fact not stipulated to: that the conviction occurred prior to May 15, 2005. In State v. Ortega, __ Wn.App. __ (55666-5-I, Aug. 21, 2006) the Court of Appeals held that the trial court properly refused a stipulation to prior convictions because the proposed stipulation was insufficient to encompass the State’s burden. Had the State made a timely objection to Mr. Roswell’s proposed stipulation, then the trial court would have been within its discretion to either refuse the stipulation or require that it be supplemented to include that the conviction was prior to May 15, 2005. The State did not object to the language of the stipulation and submitted its own “to convict” instruction that included the date of May 15, 2005, making it the law of the case. The State then failed to prove that the conviction was prior to May 15, 2006.

There is a second fact which distinguishes Mr. Roswell's case from the Wolf case. In Wolf, the defendant agreed that the existence of a serious offense would be read to the jury as part of the jury instructions. On the other hand, Mr. Roswell vigorously opposed the jury being told of the stipulation. Mr. Roswell filed a written waiver to jury on the issue of whether he had a prior felony sex offense, but the State just as vigorously opposed the waiver. According to the State, it had the right to prove its case however it wanted and the defense had no right to "eviscerate" its case. The court agreed with the State and refused the jury waiver. Given that the State was so anxious to prove that Mr. Roswell had a felony sex offense, and that the court refused Mr. Roswell's offer to remove this issue entirely from the jury, it cannot be concluded that he waived his right to have the State prove all of the elements of the "to convict" instruction. The Communication convictions should be dismissed with prejudice for insufficient evidence.

3. The trial court erred by denying Mr. Roswell's partial jury waiver.

If this Court does not dismiss the Communication convictions for insufficient evidence, the next issue is whether the trial court erred by refusing the partial jury waiver on the element that he had been previously convicted of a felony sex offense. There are two parts to this question.

First, was the trial court required to accept the stipulation to the existence of the felony sex offense? Second, was the trial court required to accept the jury waiver as to that element of the offense?

The first question is the easiest to answer. In certain circumstances, a defendant has the right to stipulate to the existence of a necessary fact and force the stipulation on the State. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Compare State v. Gladden, 116 Wn. App. 561, 66 P.3d 1095 (2003) (trial court properly refused offer to stipulate away the entire element, rather than stipulate to the existence of the prior felony sex offense). The trial court was correct to require the State to accept Mr. Roswell's offer to stipulate.

The second question is more novel: must a court accept a partial jury waiver in order to prevent a jury from hearing the defendant's criminal history when the history is an essential element of the offense? On the one hand, a defendant has an interest in restricting the amount of prejudicial information learned by the jury. On the other hand, the State has the right, indeed the obligation, of proving its case beyond a reasonable doubt. In many ways, this quandary is similar to the debate that led to the Supreme Court granting certiorari in the Old Chief case. See Old Chief at 177-78 and cases cited therein (federal Courts of Appeal

were “divided sharply” on whether a stipulation to criminal history must be accepted).

The analysis of State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002) is applicable to this discussion. In Oster, the defendant claimed error because the “to convict” instruction omitted an element of the offense. Specifically, the instruction did not require the jury to find that the defendant had been twice previously convicted of violating a no contact order. Instead, the court used a special verdict form to determine whether the element had been proved.

The Court began by recognizing the long-standing rule that the “to convict” instruction must include all the elements of the offense. State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997). But the Court concluded that an exception was warranted when the element is the existence of prior criminal history:

[W]e recognize a special exception when the element of a crime is prior criminal history and where, as here, only after determining that all of the other elements of the crime have been proved, the jury is asked by special verdict form to decide, beyond a reasonable doubt, whether or not the accused has committed prior crimes. Instructional bifurcation with respect to criminal history has an important benefit to the accused: it constrains the prejudicial effect of prior convictions upon the jury while clearly maintaining the State's burden to prove each element beyond a reasonable doubt. The purpose of requiring all of the elements to be contained in the “to convict” instruction is to protect the due process rights of criminal defendants. However, in the context of proving prior criminal

history, the criminal defendant is afforded greater constitutional protection by adopting a bifurcated instruction which guards against unfair prejudices and guarantees that the State meets its burden. See State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) ("Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes.")

Oster at 148.

The recognition of the court that a "bifurcated" trial is merited in order to reduce the prejudice to the defendant caused by introducing criminal history is consistent with other areas of the law. In the context of Blakely v. Washington, for instance, the existence of a prior conviction is an exception to the general rule that aggravating facts must be proved to a jury. In State v. Hughes the Court quoted from Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) for the proposition that a "defendant [does] not have a right to a jury trial on facts of recidivism, specifically, prior convictions." Similarly, in RCW 9.94A.535 (2), the legislature provided that an exceptional sentence may be imposed without a finding from the jury in four contexts, three of which relate the existence of prior criminal history.

Once the issue is resolved that a "bifurcated" trial is permitted, the next issue is whether a defendant may waive his or her right to a jury as to the second half of the trial. It is worth noting that, in the context of death

sentences where bifurcated trials are routine, the statute permits a defendant to waive his right to a jury determination at the special sentencing proceeding. RCW 10.95.050(2). RCW 9.94A.537 permits jury waiver of aggravating circumstances.

That a defendant may seek to partially waive his right to a jury trial was anticipated by the Court's decision in Blakely. There, the majority said:

If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how Apprendi can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

Blakely v. Washington, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), citing Apprendi v. New Jersey, 430 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Washington Supreme Court quoted this paragraph directly in State v. Hughes, 154 Wn.2d 118, 133-34, 110 P.3d 192 (2005). As the Court explained in Hughes, a defendant may waive the right to a jury or stipulate to facts supporting an increase in the maximum penalty. Mr. Roswell attempted to do what the Blakely and Hughes court anticipated by asking the court to decide without a jury whether the maximum penalty for his offense is one year or five years.

The prosecutor's complaint in the trial court that the defense was trying to "eviscerate" its case is completely without foundation and was summarily dismissed by the majority in Old Chief. The Court said that the normal rule that a prosecutor is entitled to present its case in the manner in which it chooses is based upon "good sense." "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." Old Chief at 189. But this principle has no application when the fact to be proved is the "defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." Old Chief at 191. Further, the danger of the jury using the evidence improperly as propensity evidence weighs in favor of requiring the State to accept the stipulation. Old Chief at 181.

The prejudice in Mr. Roswell's case is brought into even more focus when one considers the impact of the State's motion to introduce evidence pursuant to ER 404(b). The State sought to introduce the details of Mr. Roswell's prior Child Molestation charge under ER 404(b). The trial court weighed the evidence and concluded that the prejudicial value substantially outweighed the probative value. By admitting the fact of the prior conviction as a "felony sex offense," the jury was allowed to hear some (though admittedly not all) of the facts that the judge deemed too

prejudicial to introduce. The trial court erred by denying the partial jury waiver.

Given the recognition by Washington courts that courts should take pains to safeguard the rights of defendants and reduce the risk of prejudice inherent in admitting criminal history, the logical extension of Oster's bifurcated trial includes the right to waive jury as to part of the trial. The trial court erred by denying his partial waiver of jury trial.

4. The trial court erred by imposing an exceptional term of community custody.

The State sought to impose an exceptional sentence against Mr. Roswell because of rapid recidivism and multiple current offenses. The jury was unable to agree on rapid recidivism so the judge was prohibited from imposing an exceptional sentence on that ground.

RCW 9.94A.535(2)(c) appears to permit an exceptional sentence without a jury finding for "multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." This statute is of questionable constitutionality given the analysis of State v. Hughes. But it is not necessary to reach that issue in this case. The judge specifically declined to find that this provision applies. The court said, "[I]t's hard to decide whether the aggravating factor is sufficient in your case to warrant the exceptional sentence. I'm

toying – not toying with. That's the wrong word. I'm struggling with that. I'm not going to do it. Perhaps I should, but I'm not." RP (Jan.20, 2006), 15. The trial court clearly did not conclude that Mr. Roswell's criminal history was a "substantial and compelling reason" for an exceptional sentence. Additionally, the trial court did not enter written findings of fact and conclusions of law as required by RCW 9.94A.535. Remand is unnecessary for written findings given the oral record where the judge declined to find any aggravating circumstances.

But despite the court's conclusion that no aggravating circumstances exist, the court decided to impose an exceptional term of community custody, apparently because of its perception that Mr. Roswell needs additional treatment. This is not a legally cognizable basis for an exceptional sentence. The exceptional term of community custody must be vacated.

D. Conclusion

The two counts of Communication with a Minor for Immoral Purposes should be dismissed. The remaining count of Child Molestation should be reversed and remanded for a new trial without evidence of the felony sex offense. The exceptional term of community custody should be reversed.

DATED this 20th day of September, 2006.

A handwritten signature in black ink, consisting of a large, sweeping initial 'T' followed by several loops and a final flourish.

Thomas E. Weaver, WSBA #22488
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Plaintiff,

vs.

JOHNATHON D. ROSWELL,

Defendant.

) Case No.: 05-1-01048-5

) Court of Appeals No.: 34334-7-II

) AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)

COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

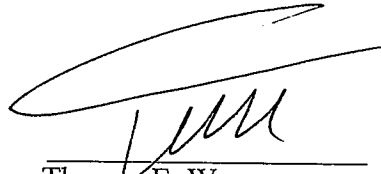
I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,
and competent to be a witness.

On September 20, 2006 I sent an original and copy, postage prepaid, of BRIEF OF
APPELLANT to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On September 20, 2006 I sent a copy, postage prepaid, of BRIEF OF APPELLANT to
the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366.

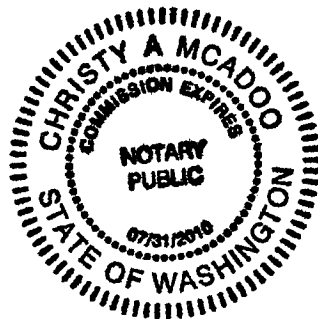
1 On August 20, 2006 I sent a copy, postage prepaid, of BRIEF OF APPELLANT to
2 Johnathon Roswell DOC #863601, c/o Washington Corrections Center, P.O. Box 900, Shelton,
3 WA 98584 LEGAL MAIL.

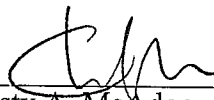
4 Dated this 20th day of September, 2006.

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6 

7 Thomas E. Weaver
8 WSBA #22488
9 Attorney for Defendant

10 SUBSCRIBED AND SWORN to before me this 20th day of September, 2006.



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Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 7/31/2010